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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	
	)	
	)	

COMMENTS OF

NASHOBA COMMUNICATIONS LIMITED PARTNERSHIP

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SUMMARY

Overregulation would be disastrous to the expansion of cable plant to unserved areas, the expansion of cable system channel capacity, improvements to cable technology, and the growth in diverse cable programming services.

In establishing effective competition regulations, the FCC should ensure that the thirty percent penetration test covers total homes in the franchise area, not homes passed, and should not relate to whether the franchise requires all residents to be served. The prong of the test regarding fifty percent of households being offered service by a competitor should likewise reflect service that is technically capable of being provided, to avoid manipulation through denial of service by competitors.

Basic cable service regulations should permit cable operators to change the mix of basic and non-basic tiers. Congress intended only one basic tier to be subject to local rate oversight. Broadcast "superstations" received by microwave should not be required on basic if they are also available via satellite. PEG channels should only be included if required by the franchise, and only if they actually carry PEG programming.

Franchising authorities have discretion to <u>decline</u> to seek basic rate regulation certification. Unless franchising authorities seek such certification <u>and</u> the Commission denies or revokes certification, the Commission has no authority to regulate basic rates. The 1992 Cable Act does not permit franchising authorities to regulate basic rates without legal authority under state law and local franchises.

The Commission's basic rate formula should be self-effectuating, simple, devoid of cost or financial data; it should allow for a reasonable profit, and it should allow rate increases consistent with FCC standards. Nashoba supports the Commission's benchmark proposal. Benchmarks should be calculated on a per-channel basis, and should not contain an overall rate cap. The benchmark should have a minimum rate or "floor." It should be adjusted annually for inflation, based on the Consumer Price Index ("CPI") or the admissions component of the CPI. Cost of service regulation should only be used as a "safety net" to justify rates that exceed the benchmarks.

Possible benchmark factors are activated channel capacity, density, plant age, percent of aerial vs. underground plant, system size, MSO size, off-air broadcast signal availability, and regional labor cost index. Current average per-channel rates are perhaps the best available benchmark. Effective competition will not provide a valid benchmark. Past regulated rates could perhaps be a benchmark, but 1986 is an inappropriate starting point. December 31, 1975, updated for inflation and other costs, would be more valid. Price caps would not be an effective benchmark, and would wrongly penalize cable operators with low rates.

Regulation of equipment rates should be based on the service received. Only equipment used solely to receive basic service is regulated based on actual cost. Actual cost pricing includes installation, amortization, maintenance, financing, general administrative overhead, and a reasonable profit. Equipment used to receive cable programming service is regulated if found to be "unreasonable" pursuant to a valid complaint. Equipment used to receive pay programming is unregulated. Equipment should also be subject to an "effective competition" standard, whereby equipment rates would be deregulated if available from independent sources.

Bundling of converters and remotes should be permitted. Moreover, the FCC should evaluate prices for <u>all</u> basic equipment, including converters and remotes, additional outlets ("AOs"), service calls, and installations in a "basket" whose overall rate, rather than individual component rates, would be subject to the Commission's standards. Bundling of non-basic equipment and service is permitted under the 1992 Cable Act.

Cable operators should be allowed to establish flexible hourly installation rates, which would be deemed reasonable if they do not exceed telco labor rates. Installation and maintenance of AOs should be subject to the same standard as equipment installations. The service aspect of AOs is governed by the 1992 Cable Act's rate regulations, depending on the service received by each AO.

Itemization on separate lines of all costs identified under the 1992 Cable Act, including PEG access support payments, franchise obligations, franchise fees, retransmission consent payments and other direct costs of basic service, and governmental assessments, should be permitted. Pass-throughs should be added to the bill below the service components, but above the total, to encourage uniform net service rates.

Basic rate increases should be implemented after thirty days' notice. The FCC, not the courts, should handle disputes regarding implementation of the rate standards in order to provide national guidance. Only refunds of non-basic rates are provided for in the 1992 Cable Act. If basic rates are found unreasonable, the operator should have discretion to reduce the rate or add sufficient services to meet the benchmark.

Non-basic rate standards are designed to catch only "bad actors." Complaints should involve overall rates, not just the non-basic tier, to account for the operator's allocation of costs, etc. Simple packaging of services (e.g., a la carte, multi-pay discounts, multiplexing) does not constitute cable programming service and is not subject to regulation. "Bad actor" regulations should examine rates charged by comparable systems, the history of the system's rates, and the system's rates as a whole. If rates exceed the benchmark, the operator should have discretion either to roll back rates or add additional services to meet the benchmark. If refunds are ordered, cable operators should be allowed to offer prospective discounts.

The 1992 Cable Act's uniform rate and discrimination provisions apply only to rates charged by cable operators, not to the total bill. It also applies only to similarly situated customers (except for geographic area), not to bulk, institutional, or other special classes. The applicable geographic area includes all territory served by a cable system, except where the system serves multiple franchise areas which charge different non-itemizable government assessments.

Negative options are limited to situations where subscribers are billed for a new service to which they did not already subscribe, without their consent. Likewise, evasions are limited to implicit rate increases associated with tiering services that result in less service for the same per-channel price.

Small systems (i.e, 1,000 or fewer subscribers measured on a franchise basis) should be given relief from the Commission's rate regulations. A twenty percent cushion above the applicable benchmarks, relief from reporting requirements, separate benchmarks that group small systems together, and joint certification should be required for all communities served by such systems which seek to regulate basic rates.

Grandfathered basic rate agreements must be enforceable by the franchising authority or the cable operator regardless of the resulting rates. Cable programming service rates would be subject to review exclusively by the Commission.

The Commission's data collection should take place on a single form, and it should preempt more onerous franchise requirements. Data collection should be system, not franchise, based. If cost of service regulation is rejected, there is no basis for collecting cost data.

The Commission should adopt a moderate transition timetable in order to collect necessary data and avoid disruptions to cable operators and consumers. In no event should the rate regulation regime take effect before January 1, 1994.

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COMMENTS

Nashoba Communications Limited Partnership ("Nashoba"), by its attorneys, hereby respectfully submits these comments in response to the above-captioned Notice of Proposed Rule Making[1] regarding implementation of the rate regulation provisions contained in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[2]

INTRODUCTION

Nashoba urges the Commission not to lose sight of the overriding goal of insuring the ability of the cable television industry to continue to provide extraordinary benefits to consumers as it develops regulations to implement the rate regulation provisions of the 1992 Cable Act.

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[1] Notice of Proposed Rulemaking in MM Docket No. 92-266, ___ FCC Rcd ___, adopted December 10, 1992 ("Notice").

[2] Pub. L. 102-385, 106 Stat. 1460 (1992), amending the Communications Act of 1934 (the "Act"), 47 U.S.C. § 151 et seq.

At Congress' direction, the Commission's Notice considers a myriad of issues concerning the 1992 Cable Act's regulation of cable television rates and equipment. Accordingly, the rules ultimately adopted by the Commission in this proceeding will have a significant impact upon the future of the cable television industry and the U.S. economy as a whole.

As the Commission acknowledged a mere two and one-half years ago, basic rate deregulation has provided great benefits to the American public in the form of a huge expansion of plant, channel capacity, and programming offerings:

> First, the cable industry has invested in expanding its plant to the point where it now offers multichannel video service to about 90 percent of Americans; before the [1984] Cable Act, cable was available to 70 percent of American households. Second, the cable industry has significantly expanded its channel capacity -- now offering substantially greater viewing choices to the American public. . . . Third, the cable industry has launched numerous new programming services and original programs. Indeed, the number of cable programming services has doubled since the [1984] Cable Act. The cable industry has tripled annual spending on programming from $302 million to $965 million during this same period.[3]

The Commission now faces a very complex task. It must proceed with extreme caution in establishing regulations for cable rates and equipment. If the Commission goes too far and its regulations effectively stifle the flow of capital to the cable industry, the growth in plant, channel capacity, and diverse programming, which the Commission recognizes has been a tremendous benefit to consumers, will come screeching to a halt.

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[3]Report in MM Docket No. 89-600, 5 FCC Rcd 4962, ¶ 3 (1990) (footnotes omitted).

I. EFFECTIVE COMPETITION TEST

The 1992 Cable Act's amendments to the Act establish an overall preference for competition over regulation.[4] The Act permits regulation of a cable system's subscription rates except when the FCC finds that the cable system "is not subject to effective competition."[5] Under the Act, a cable system is deemed to be subject to effective competition if any one of the following three standards is met.[6] The first standard is met if less than thirty percent of the households in the franchise area subscribe to cable service. The second standard is met if two conditions are satisfied: (i) there are in the franchise area "at least two unaffiliated multichannel video distributors each of which offers comparable video programming to at least fifty percent of the households in the franchise area;"[7] and (ii) the number of households that subscribe to such distributors, excluding the largest distributor, is greater than fifteen percent of the total number of households in the franchise area. The third standard is met when the franchising authority is itself a multichannel video program distributor and offers its

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[4] See 47 U.S.C. § 543(a) (entitled "Competition Preference"); 47 U.S.C. § 543(a)(2) (entitled "Preference for competition").

[5] 47 U.S.C. § 543(a)(2).

[6] Id. at § 543(l)(1).

[7] Id. at § 543(l)(1)(B)(i).

programming to fifty percent or more of the total number of households in the franchise area.[8]

The effective competition standards to be promulgated by the FCC should reflect the realities of cable television service and its competitive environment. A cable television operator in a single franchise area may serve many different types of customers, from a single family home to a multi-story apartment complex. The cable operator faces competition from many different sources which may target diverse segments of the cable franchise area. The FCC should base its determination of "effective competition" with these industry realities in mind.

A. The Thirty Percent Penetration Test Should Apply To All Homes In The Franchise Area.

Nashoba agrees with the statement in the Notice that effective competition should be found to exist where less than thirty percent of the homes in the franchise area subscribe to cable television service.[9] The statute clearly establishes that the relevant base is the "households in the franchise area."[10] Thus, considerations of how many homes are actually passed by the cable system or whether the operator is required to build cable plant to all portions of the franchise area are not relevant for the first effective competition test.

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[8]These same standards are described in the Notice at ¶ 7.

[9]Notice at ¶ 7.

[10]47 U.S.C. § 543(l)(1)(A).

B. Competition By Different Technologies Requires Tailoring Of The Effective Competition Determination.

The second test for effective competition measures the effects on the cable operator's service from rival multichannel video programming distributors. The cable operator may face competition from such multichannel video programming distributors as other cable operators, multichannel multipoint distribution service ("MMDS"), television receive-only satellite program distributors ("TVROs"), direct broadcast satellite ("DBS"),[11] satellite master antenna television ("SMATV"),[12] telephone video dialtone service,[13] and local multipoint distribution service

[11]Cable operators, MMDS, DBS, and TVROs are statutorily defined as a "multichannel video programming distributor." 47 U.S.C. § 522(12). Services that are statutorily defined as such should be considered to be multichannel programming distributors regardless of the number of channels these services choose to market.

[12]Although SMATV is not specifically mentioned as an example of a "multichannel video programming distributor" in § 602(12) of the Act, it does meet the general definition of one who "makes available . . . multiple channels of video programming." In addition, Congress has recognized that SMATV systems are essentially private cable systems that "utilize the same technology and satellite reception capabilities as the larger municipally franchised cable system." S. Rep. No. 67, 98th Cong., 1st Sess. 19 (1983); see also H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984) ("1984 House Report") (SMATV systems are potential competitors of cable systems).

[13] Video dialtone service would permit video programmers to use the local telephone access to households to "provide either single or multichannel services." In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, ¶ 2, n.3 (1992). If multiple channels of video programming are offered, video dialtone is just as viable a competitor to cable service as MMDS, DBS, or SMATV, and should be considered a multichannel video programming distributor.

("LMDS").[14] These alternative providers vary in their approach to service and often target only a segment of the total population in the community. Thus, the cable operator may face greater degrees of competition from various multichannel video providers in different segments of the franchise area. FCC rules need to be flexible to provide cable operators with deregulated status in any segment where the effective competition test is satisfied.[15]

Of particular concern to Nashoba is the level of discrete competition that occurs for subscribers in multiple dwelling units ("MDUs"). For example, a franchise area may contain many MDUs that are capable of being served by both the franchised cable operator and a SMATV or MMDS operator. The SMATV or MMDS operator may have no plan to offer service throughout the franchise area and is under no franchise obligation to offer such services. In many communities, MDU households are a minority of the total number of households, so the SMATV or MMDS operator can offer service to every MDU without triggering the fifty percent

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[14]The FCC has not yet licensed LMDS service. However, the Commission has recognized that the most significant use of LMDS service will be to provide video services in competition with cable television operators. Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration in Docket No. 92-297, ___ FCC Rcd ___, ¶ 16 (released January 8, 1993).

[15]Congress has expressed its preference for competition over regulation. See 47 U.S.C. § 543(a)(2); see also H.R. Rep. No. 628, 102d Cong., 2d Sess. 34 (1992) ("House Report") ("a fully competitive marketplace ultimately will provide the most efficient and broadest safeguards for consumers").

margin of the second standard. Competition for MDU customers, however, is often particularly heated.

FCC effective competition rules that would consider an entire franchise area as a homogeneous whole and blindly impose rate regulation as to the MDU segment would not be in the public interest. By applying the rules in that way, competition declines because the regulated cable operator cannot compete on a level playing field with an unregulated SMATV operator. Instead, the FCC could encourage competition by allowing cable operators to have deregulated status where competitive video programmers meet the fifty percent and fifteen percent measures with respect to the MDU segment of the franchise area.

To accurately measure the level of competition for MDU residents, the definition of "households" should include the number of possible subscriber units in each such facility in the franchise area. Paragraph 8 of the Notice states that, with respect to the second and third tests for effective competition, "[w]e plan to count each separately billed or billable customer as a 'household.'" Billing, however, is not an adequate measure of the total number of separate dwellings that pay for access to cable television. In the case of MDUs, the apartment dweller may pay its landlord for the right to service or it may be incorporated within the rental fee. Under the Notice's definition of "household," these MDUs may only be counted once if the cable operator bills only the landlord on a "bulk" basis. Alternatively, the landlord may not have such an agreement with the cable operator, so each apartment dweller would be counted as an individual household under the Notice's definition. The FCC should take MDU agreements into account and adopt a definition that counts each dwelling unit that receives authorized access to cable service as a "household."

FCC rules should be drafted to reduce the potential for manipulation of the effective competition standard by rival video programmers. In the Notice, the FCC tentatively concludes that fifty percent of the households are "offered" video programming when it is "actually available" to those households.[16] This standard, however, permits the competitive video distributors to control whether the cable operator is subject to rate regulation. It provides a tremendous disincentive for these rivals to serve a broader public and possibly free up its greatest competitor, the cable operator, from rate regulation. To better foster competition, the FCC should deem that rival video programmers "offer" programming to a household when they are technically capable of providing their service to that household.[17] Thus, the rival multichannel video programming distributors would have no artificial incentive to refuse service to particular

[16]Notice at ¶ 8.

[17]The legislative history shows that Congress contemplated a "technically capable" standard. In the Senate debate on the Conference Report, Senator Lieberman posed a hypothetical to Senator Inouye in these terms when referring to the fifty percent benchmark; "an unaffiliated DBS provider is <u>capable of providing</u> comparable service to the entire franchise area." 138 Cong. Rec. S14253 (daily ed. Sept. 21, 1992) (statement of Sen. Lieberman) (emphasis added).

customers. Under this definition, the rival may reach the fifty percent "offer" threshold when it first begins service, although the effective competition test would still not be met. However, when aggregate competition reaches the level of fifteen percent subscription among the households of the franchise area, the effective competition test would be satisfied.[18]

The statutory definition refers to competitors which offer "comparable" video programming, and paragraph 9 of the Notice seeks comment on whether a minimum amount of programming or number of channels is necessary to be deemed comparable to cable television service for purposes of the second standard for effective competition. The Notice seeks comment on the approach that competitive services are presumed to offer comparable video programming if the competitive services reach levels of subscriber penetration of fifteen percent or greater.[19]

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[18]The Commission must also account for the fact that information regarding whether the fifty percent/fifteen percent tests have been met by competing multichannel video programming distributors may not be readily available. The Commission's rules should require such competitors to disclose such information in appropriate circumstances.

[19]Paragraph 9 and note 15 of the Notice seek comment on whether the fifteen percent threshold may be met by accumulating the market shares of two or more competitors to the cable operator. The statute clearly provides that the fifteen percent test is to be determined by calculating the percent of total households "subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor." 47 U.S.C. § 543(l)(1)(B)(ii) (emphasis added); see also 138 Cong. Rec. S14253 (daily ed. Sept. 21, 1992) (In the colloquy between Senators Lieberman and Inouye, the example of two DBS providers, each with ten percent of the households in the franchise area, does not meet test because one DBS provider is affiliated with

considering the subscriber's numerous video options in the current highly competitive environment, including the off-air availability of free broadcast television, this presumption is sound. If competitors are gaining more than fifteen percent of potential subscribers, the Commenters urge the Commission to presume that the competitive services must be deemed comparable to cable television services; otherwise they would not achieve such high consumer acceptance. Any other interpretation would require the Commission to embark upon the slippery slope of attempting to make content-based determinations of comparability.

II. BASIC CABLE SERVICE REGULATION

A. Components Of Basic Service Subject To Regulation.

1. Cable Operators Retain The Unlimited Right To Add, Delete Or Change The Mix Of Services On Basic And Non-Basic Tiers.

As established in Section 623(b) of the Act, the Commission is entrusted with the task of implementing Congress' desire that the rates cable operators charge for the basic level of service are reasonable.[20] The legislative history of the 1992 Cable Act, in fact, directs the Commission to "promulgate regulations that will govern the provision of a low priced tier of programming . .

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the cable operator. The implication from this example is that without the affiliation, the shares would be accumulated as twenty percent).

[20]See 47 U.S.C. § 543(b).

. ."[21] In attempting to define the precise components of the basic service tier, the Commission should be cognizant of Congress' obvious desire to keep the rates charged for basic service relatively low. The Commission should recognize, however, that this intent cannot be achieved if local and state governments are allowed to force cable operators, without appropriate compensation, to create large basic service levels bloated by mandating the inclusion of expensive cable services beyond those specified in Section 623(b)(7)(A).

Despite the existence of local franchises requiring that cable operators place certain programming services on basic service, the unlimited right of cable operators to move different programming services in and out of both basic and non-basic tiers is acknowledged by Section 623(h) of the Act which specifically contemplates retiering.[22] Furthermore, the basic service definition contained in Section 623(b)(7) of the Act is obviously intended to provide cable operators with flexibility to retier their service offerings in order to bring their basic service into line with the Act's new requirements.[23]

Any retiering and reconfiguration associated with creation of a new basic service under the 1992 Cable Act will not be

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[21]House Report at 81-82.

[22]See 47 U.S.C. § 543(h) (directing the Commission to establish methods for preventing rate regulation evasions resulting from retiering).

[23]Id. at § 543(b)(7); Notice at ¶ 127.

entirely immune from regulatory review, however. Both a cable operator's basic and upper tier rates may be subject to new review as a result of implicit rate increases due to such retiering and reconfiguration. Under Section 623(c) of the Act, subscribers and franchising authorities may challenge as unreasonable a cable operator's rates for cable programming services and the Commission must provide "fair and expeditious procedures for the receipt, consideration and resolution" of such complaints.[24] In addition, under Section 623(h), the Commission is directed to prevent evasions of the new rate regulations, including those "that result from retiering."[25] If, for instance, a cable operator's retiering of services resulted in a net loss of channels from an expanded tier without a commensurate net decrease in the price of that tier, such an action by the cable operator would be subject to the Commission's review upon receipt of an appropriate complaint.[26] The availability of such review should act as a disincentive to the exercise of cable operators' right to retier their service offerings.

In addition to prescribing the minimum contents cable operators must include in their basic service and permitting discretionary additions thereto, Section 623(b)(7) also preempts, by operation of law, any franchise provisions requiring cable

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[24]47 U.S.C. § 543(c).

[25]Id. at § 543(h).

[26]Id. at § 543(c).

operators to include specific additional broadcast or non-broadcast services on the basic service.[27] For instance, under the provisions of Section 325 of the Act, certain broadcast stations may elect to seek retransmission consent for carriage of their signals rather than asserting their must-carry status under Sections 614 and 615.[28] Under such a scenario, the broadcaster would enter into negotiations with the cable operator over compensation for carriage of its signal. If, however, no agreement is reached between the broadcaster and the cable operator over such retransmission consent, the result would be the deletion of that broadcast station's signal from the system.

Similarly, in promulgating rate regulations governing the content of basic service, the Commission must bear in mind that cable operators often carry distant broadcast stations on basic service in accordance with the structure of the current copyright law. However, Section 623(b)(7)(A)(iii) specifically excepts from required inclusion in the basic service any broadcast station "signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station."[29] This exception to carriage of broadcast station signals on basic service operates as a preemption of any franchise provisions

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[27]Id. at § 543(b)(7).

[28]Id. at § 325.

[29]Id. at § 543(b)(7)(A)(iii).

specifically requiring satellite delivered broadcast signals on basic. Accordingly, the Commission must expressly reiterate that enforcing franchise requirements that such signals be included on basic service would be contrary to the provisions of the 1992 Cable Act and would impinge upon the right of cable operators to add, delete or change the mix of programming offered on their service tiers. The degree to which cable operators have discretion over their basic tier content is moderated, however, by the statutory specifications as to the minimum level of service offered on the basic tier.

The 1992 Cable Act's preemption of local franchise control over a cable operator's basic service content must be viewed as the result of a policy trade-off. Specifically, franchising authorities have been given greater regulatory authority over basic service rates and cable operators have been given greater discretion over the content of their basic service. In essence, given the pervasive regulatory scheme adopted by Congress in the 1992 Cable Act, it is evident that Congress intended to embrace the policy espoused by the Commission in its Community Cable case:

> [S]tate and local prescriptions purporting to control carriage and placement of broadcast and cablecast signals on cable systems have been preempted. And, as previously stated, 'proposals or agreements contrary to the federal rules are ultra vires and of no force or effect.'[30]

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[30]Community Cable TV, Inc., 98 FCC 2d 1180, ¶ 18 (1984) (citations omitted).

Indeed, the legislative history of Subsection 623(b) indicates that it was Congress' intent that the basic tier contain "other video programming signals that the cable operator may choose to provide on the basic tier."[31] It is evident that cable operators were intended to have absolute, unfettered discretion in adding services to basic beyond those mandated by the statute. Thus, the 1992 Cable Act must be read to preempt any franchise requirements that attempt to specify the content of basic service.

2. Congress Intended That There Should Be Only One Basic Tier Subject To Local Rate Oversight, Which Contains The Statutory Requirements Of Broadcast And PEG Channels.

Under the new Section 623(b)(7)(A) of the Act, entitled "Components of Basic Tier Subject to Rate Regulation," Congress sets out the minimum content that cable operators are required to offer to subscribers on a basic service tier.[32] The basic service level, as Congress intended, is the only tier which is subject to local regulation and, following Congress' direction in the buy-through prohibition, is also intended to be the only tier to which cable operators may require subscription "as a condition of access to video programming offered on a per channel or per program basis."[33] Under the new Section 623 of the Act, Congress

[31] H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 60 (1992) ("Conf. Report").

[32] 47 U.S.C. § 543(b)(7)(A).

[33] Id. at § 543(b)(8)(A).

has mandated that "basic cable service" be placed on a "separately available," "low priced tier of programming."[34] Furthermore, the 1992 Cable Act makes no mention of multiple basic service tiers. It appears quite clearly, therefore, as the Commission tentatively concludes, that "Congress intended the existence of only one such tier."[35]

As the Commission correctly notes, however, the D.C. Circuit has held that, under the 1984 Cable Act, cumulative tiers of services (e.g., basic tier + second tier offered together for one price = basic service tier) would be subject to rate regulation.[36] Under this prior interpretation of the 1984 Cable Act, a cable operator could offer several tiers of basic service simply by marketing and pricing all of its tiers on a cumulative basis, rather than marketing and pricing successive service tiers incrementally. Employing such an approach, a cable operator could effectively avoid the buy-through prohibition and thus frustrate Congress' desire that subscribers not be forced to buy upper tiers of service as a condition to obtaining premium or pay-per-view programming where cable systems have the technical

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[34]Id. at § 543(b)(7)(A); see also House Report at 82.

[35]Notice at ¶ 13.

[36]Notice at n.24 (citing American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) cert. denied, 485 U.S. 959 (1988)("ACLU"), which held that the lowest-priced package and the cumulatively-priced package both fall within the definition of "basic cable service" where a system offers a cumulatively-priced package that includes all of the signals offered on the lowest-priced basic tier plus additional services not offered on that tier).